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A MURDERED JOURNALIST AND A CRISIS OF CONFIDENCE IN THE JUDICIARY: THE INDEPENDENT COMMISSION OF INQUIRY INTO THE DEATH OF NORBERT ZONGO IN BURKINA FASO

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1 Introduction

Commissions of inquiry are established in response to moments of crisis, moments of rupture in the normal conduct of governance. Sometimes they are established because the scale of the crisis, in terms of either affected parties or possible perpetrators, is simply too large and would overwhelm a routine investigation; sometimes because the origins of the crisis, or the possible routes out of the crisis, are too complex, and need to be pieced together by an *ad hoc* entity with particular expertise. And sometimes a commission is established to investigate a crisis that is neither large-scale nor complex, but which has implications that involve significant political or social interests and where there is no public faith that the normal mechanisms (though otherwise equipped to address the technical content) can be relied upon to conduct the inquiry in an independent fashion. The Independent Commission of Inquiry into the Death of Norbert Zongo

* This chapter is based upon interviews and documentary research conducted in Ouagadougou in November 2016, as well as upon other research interviews in Arusha, Banjul, Dakar and Geneva. The author spoke with former members of the Commission of Inquiry into the Death of Norbert Zongo (both governmental and civil society members), with a former member of the *Collège de Sages*, with representatives of major local human rights and press-freedom organisations, with journalists, lawyers and members of the new architecture of human rights protection in Burkina Faso. Given the significant events that occurred in 2017, after this research visit the author also took the opportunity to conduct a further interview in the margins of the African Commission on Human and Peoples' Rights in Banjul in November 2017. The author wishes to thank all those who made time to speak with him, and particularly the National Office of the Danish Institute for Human Rights, whose staff were invaluable in facilitating his interviews in Ouagadougou. He would also like to thank the Norbert Zongo Press Centre for granting access to its extensive newsprint archive.

and His Four Companions, established in Burkina Faso to respond to the death of a journalist in December 1998, falls into this final category.

This chapter will introduce the background to the Commission, describe its creation, discuss its effectiveness and examine its impact, both immediate and longer term, in terms of the pursuit of accountability for what, on the face of it, was a clear violation of the right to life. Doing so will highlight some of the challenges that even a well-constituted commission of inquiry can face, and indeed that it can present, in a situation of widespread impunity. It will also highlight a number of other processes that were begun shortly afterwards, including a second *ad hoc* mechanism, the report of which also made recommendations to the government concerning this wider culture of impunity.

Fifteen years after these events the President's attempt to override one of these recommendations and extend his term would lead to a popular overthrow of the government. Among the many priorities of the transitional government since then has been the reopening of the case against the alleged killers of Norbert Zongo. At the time of writing this reinvigorated investigation, which draws inspiration, if not precise evidence, from the work of the earlier Commission of Inquiry, has reached the stage of indicting three members of the former Presidential Guard, as well as – significantly – issuing an international warrant for the arrest of the former President's brother, Francois Compaoré (who was implicated by the Commission's report, and widely viewed as likely having commanded the deadly attack). After six months, French authorities finally moved to arrest Francois Compaoré in Paris in October 2017.

2 Background

Norbert Zongo was probably Burkina Faso's best known and most controversial journalist. He was the founder and editor in chief of the popular newspaper *L'Indépendant* and the founding member of the national human rights movement, the *Mouvement Burkinabé des droits de l'homme et des peuples* (MBDHP). He was also known for the controversial stories he investigated and published in his newspaper and his constant fight for democracy, freedom of the press and transparent government. Writing under the pen name of Henri Segbo, Zongo frequently and openly attacked state corruption and impunity that had become systemic during President Blaise Compaoré's long rule. After surviving several attempts on his life, he would joke in public about bungled attempts to assassinate him.

In 1998 Zongo had been investigating the death of a man named David Ouédraogo, the personal chauffeur of Francois Compaoré, the

President's brother and adviser. Ouédraogo and two other employees had been accused of stealing money from their employer's home. However, instead of being arrested by the police they were detained by members of the Presidential Guard (the *Régiment de la sécurité présidentielle* or RSP) and taken to their barracks. Ouédraogo subsequently died, of what the official death certificate referred to as 'illness'. However, Zongo's investigation suggested that in fact he had been tortured and died from his injuries. Nobody informed David Ouédraogo's family that he had died, nor where he had been buried. The other two prisoners were transferred to Ouagadougou prison. One of them later went to the press, which published photos of his back, showing clear evidence of the burning torture (known as *poulet rôti*, or 'roasted chicken') then used by the RSP.¹

In his various articles on the subject, Zongo was asking why the RSP had been involved at all, and what Francois Compaoré's specific role had been (he revealed the fact that the President's brother had refused to appear in civil court proceedings started by Ouédraogo's family, with summons alleging his involvement in murder and hiding of a corpse). Zongo warned of a possible cover-up. As journalist and researcher Ernst Harsch noted shortly afterwards, 'he would not let the matter rest'.²

On 13 December 1998 Zongo had been traveling to his game reserve 'Safari Sissili'. He never arrived at his destination and, instead, his burnt body was found along with the bodies of his brother, Ernest Zongo, their driver, Ablasse Nikiema, and one of his employees, Blaise Ilboudo, in their 4x4 vehicle near Sapouy, some 100 kilometres south of Ouagadougou. The event soon became known as *le drame de Sapouy*.

2.1 The immediate public reaction: A government under pressure

News of Zongo's death under overtly suspicious circumstances spread quickly. Spontaneous demonstrations broke out both in the capital and in Koudougou, Zongo's hometown. To begin with, protests mostly involved students and other youths, but soon salaried employees, professionals, street vendors and many other Burkinabé joined them. On the day of Zongo's burial large crowds of students, and then later others as well, began to march through Ouagadougou, converging on the presidential palace.

1 Sten Hagberg 'Enough is Enough: An Ethnography of the Struggle Against Impunity in Burkina Faso' *Journal of Modern African Studies* (2002) p.220.

2 Ernest Harsch '*Trop c'est trop!* Civil Insurgence in Burkina Faso, 1998-1999' *Review of African Political Economy* (1999) p.396. Also see Hagberg 'Enough is Enough' p.221.

As a contemporary commentator noted (under a pseudonym) in several of the national papers, these events were enough to tilt the country into instability: suddenly the President could be openly criticised, with the mainstream press viewed as too limited, and in its place, pamphlets were circulating Ouagadougou. The single event of Zongo's death was enough to mobilise the population to 'go down into the street'.³

During the rest of December and early January, large demonstrations, sometimes numbering tens of thousands, rocked the country. Harsch noted that newspapers specifically reported protests in at least 16 provincial towns, but rallies were likely held in smaller towns as well.⁴ Many of the protests were peaceful, but some turned violent, especially when security forces or armed supporters of the ruling party tried to stop them. Protesters vented frustration against the property of high-profile authority figures.⁵ Immediately after the public radio announcement of Zongo's death, students and pupils in Koudougou went out into the streets and attacked the homes and offices of several leading members of the ruling party, the *Congrès pour la démocratie et le progrès* (CDP). A curfew had to be imposed for a week.⁶

The intensity of the public reaction is partly explained by Zongo's popularity among Burkina's youth, especially its student population, whose political activism he had long supported.⁷ Public outrage was also heightened by the fact that the bodies had been burned, which was taken as a particular sign of disrespect to the dead. However, the protests were also seen by many as the manifestation of a far broader frustration: anthropologist Mathieu Hilgers subsequently noted that they 'reflected the

3 Jean Ouédraogo "'L'affaire Zongo": Les Burkinabé demandent justice' reprinted in *Politique Africaine* 74 (1999) p.164. As the author noted, the popularity of the government expressed through these protests was strikingly different from that inferred from the results of the recent presidential election (in November, which Compaoré had won comfortably) ('Un seul acte et un seul jour pour que la population des villes et des campagnes se mobilise, descende dans la rue, démontrant qu'elle avait du régime une tout autre appréciation que celle que les résultats des dernières élections présidentielles pouvaient laisser paraître; une appréciation plus proche de celle qui s'étalait depuis des mois dans les pages impitoyables de *L'Indépendant*').

4 Harsch, '*Trop c'est trop!*' p.398.

5 *Ibid.*

6 Hagberg, 'Enough is Enough' p.237. When the opposition later called for three *jours de villes mortes* ('dead city days'), it was in Koudougou that the call was particularly heeded.

7 Harsch, '*Trop c'est trop!*' p.396. Zongo's *L'Indépendant* had for example been very supportive during the extended student strike at the University of Ouagadougou in 1996/7, see Christopher Wise 'Chronicle of a Student Strike in Africa: The Case of Burkina Faso, 1996-1997' *African Studies Review* 41:2 (September 1998) pp.19-32.

anger associated with the journalist's death, but also a social suffering that seemed to be widespread throughout the city'.⁸

Trop c'est trop! ('enough is enough!') became a rallying cry of those taking to the street, sparked by this most recent and very high-profile murder, but also reacting to a far longer experience of impunity for 'blood crimes'. As a former ruling party member of parliament put it, 'The people have had enough. They want the rule of law. They want an end to the killings.'⁹ There was widespread frustration at the culture of impunity in Burkina. A common expression used to lament the abuses perpetrated at the behest of political power holders at the time was *Si tu fais, on te fait, et puis il n'y a rien*.¹⁰ As anthropologist Sten Hagberg reflected a few years later, the same culture of impunity 'led the holders of political power to misjudge the potential effects of Zongo's death'.¹¹

The breadth of the public reaction to Zongo's death appeared to surprise even veteran opposition politicians and caught many of them off guard. The main opposition parties had only modest electoral support, and few deputies in parliament. They had occasionally threatened non-parliamentary action to protest violations of the Constitution and the ruling party's monopoly on the official political arena, but had rarely been able to mobilise significant numbers of people. The eruption of nation-wide public protest over Zongo's death provided them with a new opportunity. Opposition party leaders quickly joined the demonstrations, spoke at protest rallies, and several were briefly arrested as a result (which, Harsch notes, somewhat raised their stature in the eyes of the younger protesters), but for the most part they seemed to be scrambling simply to keep up.¹² Had there been a plausible official opposition, or other government-in-waiting, it seems possible that the government would not have survived.¹³

8 Mathieu Hilgers 'Identité collective et lutte pour la reconnaissance: Les révoltes à Koudougou lors de l'affaire Zongo' in Mathieu Hilgers & Jacinthe Mazzocchetti *Révoltes et oppositions dans un régime semi-autoritaire: Le cas du Burkina Faso* (Paris: Karthala, 2010) p.177. ('Leurs agissements traduisaient la colère liée à la mort du journaliste, mais aussi une souffrance sociale qui semblait généralisée à l'échelle de la ville.')

9 Interview, reported in Harsch, '*Trop c'est trop!*' p.395.

10 Interviews with the author, November 2016. While not an exact translation, the usage of this phrase was to the effect that 'If you try something, they kill you, and nothing will happen'. Also see Hagberg, 'Enough is Enough' p.221.

11 Hagberg, 'Enough is Enough' p.222.

12 Harsch, '*Trop c'est trop!*' p.399f.

13 Interview with the author, November 2016.

In lieu of direction from official opposition, a loose coalition of civil society organisations, known as the *Collectif d'organisations démocratiques de masse et de partis politiques* (the *Collectif*) was established shortly after Zongo's death.¹⁴ By mid-March it comprised nearly 50 organisations.¹⁵ Centrally placed within the *Collectif* was the MBDHP, and its most prominent leader, the controversial personality of Halidou Ouédraogo, soon became the main spokesperson of the *Collectif* as a whole.¹⁶

3 Establishing a commission of inquiry: On what terms?

For those few days immediately following Zongo's assassination, the Compaoré government was teetering on the edge of collapse. The pressure on the government to do something came not only from the street but also from some significant donors (including from the US, Denmark, Austria and France) that expressed concern both about Zongo's death and other violations. As Harsch noted shortly afterwards, the government's reliance on that aid for a significant portion of its financing meant that it could not easily ignore their views.¹⁷

On 18 December, five days after the killing, the President publicly declared the creation of a commission of inquiry to investigate the murder of Norbert Zongo and to identify the perpetrators. The Commission was mandated through a formal presidential decree, which was widely publicised.¹⁸ It was to be composed of four members representing three different government departments, a representative of the Bar Association, a representative of the Zongo family, a representative of the *Société des éditeurs de presse*, a representative of the *Ligue de défense de la liberté de la presse*, a representative of the *Association des Journalistes de Burkina* and two representatives of local human rights organisations. International journalists or human rights organisations could play a part up to a quota

14 The late Joseph Ki-Zerbo would later reflect that this coalition of efforts marked a break from Burkina's civil society's previous stance of non-coordination; see D.S. Battistoli 'Toward a Sympathetic Critique of Thomas Sankara' (27 February 2017) available at: <http://africasacountry.com/2017/02/toward-a-sympathetic-critique-of-thomas-sankara/>.

15 Harsch, '*Trop c'est trop!*' p.400.

16 Ouédraogo had been a founder of the clandestine *Parti communiste révolutionnaire voltaïque* during the late 1970s. He had served as a legal adviser to Compaoré during the first few years after the 1987 *coup* but had long since broken with the government and become one of its most virulent critics.

17 Harsch, '*Trop c'est trop!*' p.402.

18 Presidential Decree 98-0490/PRES/PM/MEF/DEF/MJ-GS/MATS (19 December 1998). The text of this Decree appeared widely in the press.

of three places.¹⁹ The Commission was to be directed by a bureau elected by its members, was to elaborate and adopt its own internal procedures, and was empowered to call upon all national or international expertise it might need to effect its work.²⁰

The purpose of the Commission was clearly articulated as being to determine the cause of death of the occupants of the 4x4 vehicle found at the Sapouy junction.²¹ The Commission could hear any person it determined likely to help it to discover the truth relating to the death of Norbert Zongo; and was given six months to present the conclusions of its investigation to the head of government, who would make these public. It could have access to national and international security services when necessary to complete its task.²² The financing of the Commission was to be undertaken by the state (except for the financing of the international members); the Commission was to draw up its own budget and submit it to the Prime Minister; the state would also provide the necessary logistical support.²³ The members of the Commission were to be subject to secrecy and were not to carry out their investigations for media purposes.²⁴

The principal purpose of the Commission was very clearly, in the words of one interlocutor, to *faire la lumière sur ce qui s'est passé*.²⁵ This language of casting light is strikingly similar to that used in the context of the Commission of Inquiry in Chad several years earlier (see chapter 5), and indeed was also used at the time in Burkina Faso. Government spokespeople at the time were eager to reaffirm the government's will to cast all possible light on 'this drama' and to announce that the government would put at the Commission's disposal all the necessary means and authorisations (including any international or national experts it saw fit) to establish exactly what happened on 13 December.²⁶

19 *Ibid.*, arts. 2 and 3.

20 *Ibid.*, arts. 4 and 5.

21 *Ibid.*, art. 6.

22 *Ibid.*, arts. 7 and 8.

23 *Ibid.*, arts. 9 and 10.

24 *Ibid.*, art 11.

25 Interview with the author, November 2016 ('cast light on what it was that happened').

26 'Le gouvernement promet de faire la lumière' *Sidwaya* (21 December 1998) p.6 ('Le gouvernement réaffirme sa volonté de faire toute la lumière sur les circonstances de ce drame. A cet effet, un commission d'enquête indépendante sera mise sur pied dans les tous prochains jours ... Cette commission aura toute la latitude de s'adjoindre des experts nationaux et internationaux pour mener a bien ses investigations').

As one interlocutor, now in government, put it, *le population avait soif de justice* and this response was an appropriate measure, since the population had lost all faith in state institutions, including the judiciary.²⁷ Whatever the findings of a routine judicial inquiry, the people would not have believed it, so a special mechanism was necessary. As an article in the state's daily newspaper made clear, in explaining the various dimensions of the mandate, the executive was taking strenuous efforts 'to be cleared of all suspicion with respect to the composition of the Commission'.²⁸

This 'crisis of confidence' in the judiciary was recounted by many others, and was further evidenced at the time by civil society organisations setting up their own parallel investigative mechanisms.²⁹ On the same day that the President promised a commission of inquiry, the MBDHP released a public statement about Zongo's death, in which they provided their own documentation of the facts, and placed the event within a wider context of failures to pursue justice in a number of other cases. They provided a list of other deaths or disappearances that had not been adequately investigated, cited death threats against prominent activists or opposition members, and complained of the lack of government transparency.³⁰

While fully supporting the idea of an inquiry, the MBDHP took the opportunity to remind the public of a potential pitfall: that the issue could become buried in a bureaucracy. They recalled that an earlier commission of inquiry, into the 1991 death of Clément Oumarou Ouédraogo, had still not been made public.³¹ Indeed, the MBDHP had been in the process of petitioning the African Commission on Human and Peoples' Rights (African Commission), challenging the continued lack of transparency regarding the report of that inquiry.³² Nevertheless, it was ready to go through the process of a commission again; the MBDHP 'recorded, understood and supported the legitimate reaction of the people to demand justice' and in its public statement called for a trustworthy and independent international commission of inquiry.³³ It is not immediately clear what

27 Interview with the author, November 2016 ('the population was thirsty for justice').

28 Issaka Sourwema 'Une commission indépendante pour l'expression de la vérité' *Sidwaya* (21 December 1998) p.6 ('Le moins que l'on puisse dire est que l'exécutif veut être lavé de tout soupçon au regard de la composition de ladite commission').

29 Interviews with the author, November 2016.

30 'Mort de Norbert Zongo: Déclaration du MBDHP' (18 December 1998) reprinted in *Le Pays* (22 December 1998) p.3.

31 Interview of Halidou Ouédraogo (President of the MBDHP) with *Le Pays* journalist Adama Savadogo; see 'Le MBDHP entre deux chaises?' *Le Pays* (11 January 1999) p.8.

32 *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001).

33 'Mort de Norbert Zongo: Déclaration du MBDHP' (18 December 1998) reprinted

was meant by ‘international’ in this context, but it is important to note that international commissions of inquiry as are familiar today were not nearly so institutionalised in 1999. They had become more frequent with the end of the Cold War, and one had been established to consider Burundi in 1995, but it seems more likely that this call was for an international *component* to the investigation.³⁴

The *Collectif* immediately made clear that it did not accept the terms of the proposed commission of inquiry. It felt that the state had too many representatives, and was designating its own appointees. Moreover, the international component of the Commission was too small. It announced that it would establish its own commission of inquiry if its demands were not met before 24 December.³⁵

Certain government representatives made public statements querying how the government could be ‘over-represented’ in a commission in which it had four of 14 possible members, and speculating more generally about what the government could have to gain from the killing of Norbert Zongo. One minister wrote, ‘[w]ithout pointing fingers, the Commission of Inquiry should not close off any avenue of inquiry, including those that lead to those inciting violence under the cry of “Justice for Norbert and no to impunity!”’³⁶

However, the government was now rather painted into a corner – it had made clear that in principle it was willing to establish an independent commission of inquiry, but the only political reason to do so was to produce a report that would be credible, given the unprecedented demand from the streets for meaningful justice. Now that the independence of the body had been challenged at the outset, the government had no real choice but to relent and to reform it.

in *Le Pays* (22 December 1998) p.3 (‘MBDHP a enregistré, comprend et soutient la légitime réaction des populations pour exiger justice’).

34 A list of international commissions of inquiry and other fact-finding bodies can be found at: <http://libraryresources.unog.ch/factfinding/chronolist> (accessed September 2017).

35 See, for example, ‘Un collectif se démarque de la commission d’enquête’ *Le Pays* (21 December 1998) p.5. Also see Moussa Sawadogo ‘La Commission d’enquête installée’ *Le Pays* (8 January 1999) p.6 and Adama Savadogo’s interview with Halidou Ouédraogo (the President of the MBDHP) ‘Le MBDHP entre deux chaises?’ *Le Pays* (11 January 1999) p.8.

36 Karfala Zerbo ‘Mort de Norbert Zongo, à qui profite le crime?’ *Sidwaya* (7 January 1999) p.5 (‘Sans jeter la pierre à quiconque, la commission d’enquête ne devrait écarter aucune piste y compris même celle de ceux qui crient à la violence et ne cessent de vociférer «justice a Norbert et non à l’impunité»’).

Therefore, early in the new year the government released a revised framework for the Commission of Inquiry in a new presidential decree.³⁷ The composition of the membership of the Commission was altered: instead of four government representatives there would be only three; instead of two representatives of human rights organisations there would be three; instead of a representative of only Zongo's family there could be representatives of the families of each victim; and the quota of international organisations was raised from three to five.³⁸ A guarantee of immunity for the commissioners was added, in a direct effort to protect their independence.³⁹

The time period of the Commission was reduced from six to four months.⁴⁰ This is interesting because in some other cases one finds a commission of inquiry running out of time, and the limitation of its duration of work used to prevent it from investigating a challenging issue too directly. However, in this case it appears that the six-month mandate to investigate what was felt to be a factually straightforward incident was designed to push the publication of the report further into the future. The public's *soif de justice* needed to be quenched sooner than that.

A clause was also added regarding publication, noting that in any event the Commission could publish its report a week after handing it to the head of government.⁴¹ This was clearly a modification in response to MBDHP's concern related to the earlier commission of inquiry: an effort to make clear in the terms of reference a presumption in favour of publication, and to give control of such presumption to the Commission itself.

The contestation over the mandate of the Commission confirms both the extent of public mistrust (particularly among civil society organisations) of state institutions or personnel, and the extent to which the government felt pressured to accommodate such concerns by creating a mechanism that could be viewed as something different, and more reliable.⁴² As reformed, there was an acceptance by all parties that the Commission would be given space to conduct its work. The *Collectif* made

37 Presidential Decree 99-001/PRES/PM//MEF/MJ-GS/MATS (7 January 1999).

38 *Ibid.*, art. 2.

39 *Ibid.*, art. 5.

40 *Ibid.*, art. 7.

41 *Ibid.*

42 Interview with the author, November 2016.

it a condition of participation that those of their activists who had been arrested during the popular demonstrations be released.⁴³

Ultimately, 11 individuals made up the Independent Commission of Inquiry. The three representatives of official government ministries were Jean Emile Somda (from the Ministry of Justice); Hermann Marie Omer Traore (a captain of Gendarmerie, representing the Ministry of Defence); and Zila Joseph Gue (commissioner of police, from the Security and Territorial Administration). The civil society members had largely been nominated by their respective organisations, which had been invited on the basis of relevance to the issues at hand or an implicit understanding of seniority among the broader human rights civil society.⁴⁴ The three press freedom organisations were represented by Sibiri Eric Kam (from the *Ligue de défense de la liberté de la presse*); Moumina Chériff Sy (from the Society of Editors); and Tiergou Pierre Dabire (from the Burkina Journalists' Association). The three members of national human rights organisations were Kassoum Kambou (a magistrate and a member of the MBDHP); Victor Kafando (from *Action des Chrétiens pour l'Abolition de la Torture*, ACAT-Burkina); and Rigobert Ilboudo (from *Groupe d'Etudes et de Recherches sur la Démocratie et le Développement Économique et Social*, GERDDES-Burkina). Alphonse René Ouédraogo represented the Bar Association, and Robert Menard (one of the French founders of the international press freedom organisation, *Reporters sans Frontières*) was the only representative of an international non-governmental organisation (NGO).⁴⁵ The Commission met on 25 January 1999, nearly six weeks after the incident, to elect its bureau; and held its first hearing on 1 February.⁴⁶

4 Effectiveness of the Commission

As with the other case studies examined in this collection, before assessing the extent to which the Commission of Inquiry may have functioned as part of a meaningful process of accountability, it should be established

43 Adam Savadogo 'Les conditions d'une participation' *Le Pays* (8 January 1999) p.8.

44 Interviews with the author, November 2016.

45 There was also supposed to be a twelfth member – a second international one – a representative of the pan-African part of GERDDES (GERDDES-Afrique) from Benin. He arrived at the beginning of the work, but announced that he could not participate on a full-time basis, that he would return to Benin and directed that the material gathered by the Commission be transmitted to him and he would review it from there. The Commission decided that this would not be practical.

46 *Rapport sur les causes de la mort des occupants du véhicule de marque Toyota Land Cruiser de type 4 x 4 immatriculé 11 J 6485 BF, survenue le 13 décembre 1998 sur l'axe routier Ouagadougou–Sapouy, dont le journaliste Norbert Zongo* (6 May 1999) (*Rapport de la Commission d'enquête indépendante*) §1.6, 1.7.

how closely it adhered to some of the determinants of effectiveness suggested by international standards.⁴⁷

4.1 Independence of the Commission

The fact that civil society was in the majority among the members had a significant impact on the ‘optics’ and public legitimacy of the Commission’s independence. In discussions in the media it was always referred to as the Independent Commission of Inquiry (or its French acronym CEI). Moreover, the members decided to make Kassoum Kambou (of the MBDHP) the president of the Commission. As one commissioner pointed out, if the government had been making the appointment, he certainly would not have been the choice.⁴⁸

Another close observer of these events pointed out that this was the first commission in Burkina’s history that had an international dimension and was not composed solely of Burkinabé.⁴⁹ As noted above, certain local actors had called for an international commission of inquiry, but the inclusion of international representation, especially in the form of membership for an international NGO, was certainly a dramatic departure. The government would later describe the Commission as the first of its kind on the continent.⁵⁰ Although it is difficult to identify a specific direct impact on the Commission’s work, the inclusion of an international member was a very important symbolic departure, one that lent a substantial amount of credibility to the Commission within Burkina.⁵¹

The Commission was responsible for drawing up its own budget, and subsequently allocated a sum of nearly CFA 1,25 million (approximately \$220 000 at the time). This meant that at no stage during its work was the Commission wanting for funds – in fact, as several commissioners related, at the end of its work it had a surplus left over which it had to return

47 As has been discussed elsewhere in this volume, one important reference point for these standards is the recently-revised UN guidance, the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016); also see Thomas Probert ‘Vehicles for Accountability or Cloaks of Impunity? How can National Commissions of Inquiry Achieve Accountability for Violations of the Right to Life?’ Institute for Justice and Reconciliation Policy Brief 25 (May 2017).

48 Interview with the author, November 2016.

49 *Ibid.*

50 ‘Déclaration du gouvernement suite à la remise du rapport de la Commission d’enquête indépendante’ (10 May 1999) printed in *Sidwaya* (12-13 May 1999) p.3.

51 Interview with the author, November 2017.

to the treasury.⁵² The government certainly drew attention, subsequently, to its resourcing of the Commission and other investigations as evidence of its commitment to upholding rights, describing it as ‘an illustration of the will of the authorities to ensure that the investigation is satisfactorily concluded’.⁵³

However, several of those involved recalled during interviews that the government had also made efforts covertly to observe, if not directly to interfere in the work of the Commission. For example, it was alleged that the offices used by the Commission had been bugged, and that its phone lines were tapped. Moreover, those commissioners representing official ministries were allegedly under direct instructions to pass reports of the confidential proceedings back to their superiors. This even reached the extent of members reportedly sneaking back into the Commission’s offices overnight to make photocopies of the confidential *procès-verbaux*.⁵⁴

More directly intimidatory tactics were also employed. The state security agents charged with the Commission’s general security reported that direct threats had been made – including against the president of the Commission. They proposed providing him with a personal security detail, but Kambou preferred instead to have his organisation, the MBDHP, provide him with a private security guard.⁵⁵

With respect to the independence that comes with having its own staff, providing an investigative capacity that is separate to that of the state and facilitated on its own, the Commission was well provided for. It had a support staff composed of 16 *gendarmes*, six police officers, two clerks, seven drivers and an accountant. However, half-way through its work – in March – this group of support staff was suddenly recalled to their ministries and later replaced. No explanation was given at the time, but the fairly clear intent was to disrupt the Commission’s work.⁵⁶ The Commission took the opportunity in its final report to note that this had significantly slowed its momentum.⁵⁷

52 Interviews with the author, November 2016.

53 *Periodic Report of Burkina Faso to The African Commission on Human and Peoples’ Rights (ACHPR) on the Implementation of the African Charter on Human and Peoples’ Rights, October 1998-December 2002* (July 2003) p.8 (English version).

54 Interview with the author, November 2016.

55 Interview(s) with the author, November 2016.

56 *Ibid.*

57 *Rapport de la Commission d’enquête indépendante* §1.7.

Despite these concerns, few at the time or since have disputed the independence of this Commission. As those involved directly have recalled, it in fact was quite difficult to place commissioners under any kind of direct pressure, because of the weight of public opinion that lay behind the creation of the Commission. The Commission could also actively leverage this public support. For example, on one occasion the Chairperson sought assistance from the Ministry of Justice regarding the extension of custody of those under investigation, and the Ministry initially refused to collaborate. The Chairperson simply said that he understood, but that he would need to call a press conference to explain why he was not able to pursue this line of inquiry. Not surprisingly, the Minister immediately became more cooperative.⁵⁸

It was very difficult for the government, or another interested party, to exert influence over the day-to-day work of the Commission, although it would appear that frequent attempts were made. Probably the most direct interference came at the very end of the process, after the report had been finalised, when pressure was exerted on two of the three 'government' representatives on the Commission not to sign it. This will be discussed in greater detail below.

4.2 Investigatory powers of the Commission

In addition to independence from interference, effective investigations also need a range of investigatory powers in order to get to the bottom of complex questions of fact. The presidential decree establishing the Commission endowed it with relatively wide investigatory powers, which were later clarified in internal terms of reference: they included the power to receive denunciations, conduct hearings, request all documents, summon any person, request all relevant searches and seizures in the preservation of evidence, make inspections *in loco* and request any expert it deemed useful.⁵⁹ Witnesses and others giving testimony were not allowed to refuse the Commission on the basis of professional secrecy or national security. Moreover, the Commission had the power to reach out to both national and international security services in case of need.⁶⁰

58 Interview with the author, November 2016.

59 *Rapport de la Commission d'enquête indépendante* §1.5. See Presidential Decree 99-001 arts 7 and 8. Again, in retrospect, the government was keen to highlight the effectiveness of the Commission as an investigation, highlighting to the African Commission that it 'had broad-ranging powers'; see *Periodic Report of Burkina Faso to the ACHPR* p.8 (English version).

60 Presidential Decree 99-001 art. 8.

Despite its broad powers the Commission remained an administrative rather than a judicial investigation – which, given the nature of the allegations (at least those circulating in the public sphere at the time it was established) was a challenge. In retrospect, one commissioner described as one of the significant limitations of the Commission’s work the value that was consequently attached to its report, and to the evidence that it collected. He also stressed the lengths to which the Commission went to mitigate its administrative status by collaborating closely with the *juge d’instruction*, especially with respect to forensic material.⁶¹

As far as it could establish, the Commission enjoyed access to all the evidence it needed in order for the independent forensic experts it had contracted to do their work. The vehicle in which Zongo and his companions had been travelling had been recovered by the police and brought back to Ouagadougou, but was made available for expert examination.⁶² The Commission also conducted a site visit to the location of the incident, during which they found a shell casing they sent for ballistic analysis.⁶³

Investigatory assistance was also offered and provided by foreign governments – the US ambassador, for example, offered the services of the Federal Bureau of Investigation (FBI) to assist the Commission. Ultimately the process would have taken far too long (given the need for congressional approval in the US) but international NGOs were less hamstrung by such requirements: Handicap International played a very helpful role by providing an expert on ballistic injuries to assist in the investigation.⁶⁴

The quality of the investigative process made it more difficult for implicated actors to cover up their acts by couching their testimony in vague obscurities. For example, initially the army attempted to deny that the type of weapon used in the attack on the vehicle was the same as that which it routinely issued. However, forensic ballistic analysis made it clear that it was, and eventually the army had to concede the point. One commissioner recalled that as it became clear that the Commission was conducting an objective study, and that it had access to resources to verify or discredit information offered, the government’s attitude towards providing testimony became considerably more hesitant.⁶⁵

61 Interview with the author, November 2016.

62 *Ibid.*

63 *Rapport de la Commission d’enquête indépendante* §2.3.

64 Interview with the author, November 2016.

65 *Ibid.*

However, despite these investigative strengths, one notable exception to the powers of the Commission (reflecting a more wide-ranging limitation of Burkina's justice system at the time) was a lack of witness protection. Several commissioners raised the issue of the Commission's lack of power to provide proper protections for witnesses as a concern. Given, as noted above, that the government found it difficult to exert pressure on the commissioners, or on the experts appointed (because the Commission could choose foreigners, or others outside the government's sphere of influence), that left only the witnesses. When combined with the fact that the *procès-verbaux* the Commission was collecting were being copied and transmitted to the government (and that, therefore, the Commission could not practically keep the identities of its witnesses confidential) this was all the more alarming, and there were several instances of witnesses changing their stories.⁶⁶ One witness, who had been an eye witness to the events near Sapouy, was placed under such pressure that he threatened to commit suicide on the Commission's premises. He was a key witness whose testimony was very important to the inquiry, but there was no way for the Commission to provide security to such witnesses without relying on the government.⁶⁷

The Commission's report made no finding or recommendation about this structural problem, but it did draw explicit attention to one specific dimension of pressure on witnesses: those witnesses serving in the military. While welcoming the facilities afforded it by the government, and the powers granted it under the two presidential decrees, the Commission highlighted the fact that soldiers testifying before the Commission had been forced to report back to their superiors, which, as the Commission pointed out, 'was not without weighing on the subsequent interviewees'.⁶⁸ There apparently was one instance of a soldier testifying without having received the 'official line' and whose recollection of events therefore revealed much, but he returned the very next day and recanted his testimony.⁶⁹

4.3 Interaction of the Commission with other contemporary investigations

Commissions of inquiry often find themselves working in parallel with other institutions or investigative mechanisms. As noted above, this case was no different, with earlier local investigations having already been set up

66 *Ibid.*

67 *Ibid.*

68 *Rapport de la Commission d'enquête indépendante* §4 ('n'a pas été sans peser sur les futurs auditionnés').

69 Interview with the author, November 2016.

by the MBDHP, the *Collectif*, and an international investigation by *Reporters Sans Frontières* (RSF), all before the official Commission of Inquiry was empanelled. The MBDHP had been the first organisation to dispatch a team of investigators to the scene, and they released some of their findings in their public statement of 18 December. This investigation had largely been about documenting the scene: it highlighted the fact that there were no signs of skid marks on the road; that the vehicle had not struck an obstacle; that there were bullet holes in the rear right-hand door; and that of the four bodies found at the scene, one was outside the vehicle and three burned inside. On the basis of this evidence, the MBDHP concluded that there were '[s]erious reasons to believe that it is not an accident, but rather an odious crime apparently well-prepared and executed'.⁷⁰

Whereas the MBDHP investigation was a preliminary one taking place in lieu of more official response, the 'commission of inquiry' established by the *Collectif* was a more direct challenge to the official Commission. In its press release welcoming the opening of the official Commission, the ruling party was highly critical of the establishment of this parallel investigation – instead insisting that only the 'consensual' Commission had standing.⁷¹ Nonetheless, in its report the official Commission highlighted that it had taken on board the findings of both the MBDHP and *Collectif* investigations, as well as the *procès-verbaux* taken by the local police station and by other investigators.⁷²

The third additional investigation was conducted by the international press freedom organisation, RSF. It took place before the Commission had been formally established, although after the government had first announced it. During a week-long visit, two French journalists talked to most eye witnesses and others who had arrived on the scene afterwards. At the end of their mission they held a press conference at which they presented their report.⁷³

The RSF Report was perhaps the most damning with respect to the state's failure to investigate. It highlighted that on 31 December (more than two weeks after the incident) not one witness to whom they had spoken had been interviewed by the police, and neither had family, friends

70 'Mort de Norbert Zongo: Déclaration du MBDHP' (18 December 1998) reprinted in *Le Pays* (22 December 1998) p.3 ('sérieuses raisons de croire qu'il ne s'agit pas d'un accident, mais bel et bien d'un crime odieux apparemment bien préparé et exécuté').

71 See 'Le CDP pour une commission d'enquête consensuelle' *Sidwaya* (8-10 January 1999) p.5.

72 *Rapport de la Commission d'enquête indépendante* §2.

73 Reporters Sans Frontières (RSF) 'Le Rapport de la mission (25-31 Décembre)' published in *L'Observateur* (4 January 1999) pp.6, 12 & 20.

or colleagues of the deceased. A national police chief was quoted as trying to explain – or justify – this inaction:

We were confused. Should the police continue with their inquiries when the government had decided on 18 December to set up a commission of inquiry? Although we didn't specifically tell the local superintendent to call off the investigations, we did think it was not wise to have two inquiries going on at the same time.⁷⁴

Other police officers argued that, once the Commission had been established, for them to continue with a routine investigation of the same question might have been perceived as biased. However, as RSF pointed out, an official police investigation had only opened on 24 December, a date which 'seems a long delay for anyone seriously wanting to shed light on the case'.⁷⁵

RSF contended that questions concerning the composition of a commission should on no account absolve the authorities of their responsibilities to undertake meaningful investigation. They emphasised that there had been no local police inquiry, no interviews of the main witnesses, no selection of ballistics experts, no full autopsies. They quoted with approval a national police officer who had pointed out that such delays would inevitably result in lost leads. They suggested that in various circumstances it would be necessary to call on foreign experts where specific investigative capacity would be required, for example concerning explosives. They concluded that '[t]he political squabbles over the setting up of the independent commission of inquiry do nothing to advance the cause of those anxious to find out the truth'.⁷⁶

These criticisms from RSF were not well received by the government: the Minister of Justice, Yarga Larba, condemned the group's investigations at a press conference for having been conducted without appropriate permission.⁷⁷ However, it ought to be noted that despite this public spat and RSF's stern words, one of the organisation's founding members was

74 *Ibid.* ('Nous sommes embarrassés. Est-ce que la police devait continuer ses investigations alors que les autorités avaient décidé, dès le 18 décembre, de mettre en place une commission d'enquête? Sans ordonner explicitement au responsable provincial de cesser ses recherches, nous avons pensé qu'il n'était pas souhaitable que deux enquêtes soient menées de front.')

75 *Ibid.* ('paraît bien tardive pour qui veut sérieusement élucider cette affaire').

76 *Ibid.* ('Les débats très «politiciens» auxquels donne lieu la mise en place de la Commission d'enquête indépendante ne font pas le jeu de ceux qui sont attachés à découvrir la vérité.')

77 See Hagberg, 'Enough is Enough' p.238.

invited to participate in the Commission of Inquiry in the weeks that followed, which speaks to the latter's independence.

4.4 The timing of the Commission

As noted above, the amount of time allowed the Commission to complete its work was altered as part of the revision of the terms of reference, in order to ensure that the report came out in a timely fashion and that there was not a needless delay in establishing a record of what had happened. Nobody involved has since suggested that the Commission did not have time to complete its work. As one commissioner recollected, there was no need to contemplate an extension (though no reason to think it would not have been granted): they had enough time.⁷⁸

More problematic, as noted in the RSF report, was the delay in the establishment of the Commission. In its report the Commission noted a number of challenges it had faced during its work. It attributed these principally to the delay in the start of its work, and partly to the reticence on the part of the public to volunteer testimony. Although the event happened on 13 December, the inquiry did not effectively begin its work until 1 February the next year. This delay (combined with the confusion that led to police inaction immediately after the events, discussed above) diminished the chance of conservation of evidence, and first-hand recollection of events.⁷⁹

Some degree of delay is probably inevitable in an *ad hoc* mechanism such as a commission of inquiry (given the need to draw up terms of reference, appoint or at least assemble staff, and devise investigative plans). Moreover, in this case it was arguably not the fault of the government that this inquiry was delayed by as long as it was – a commission was announced within a week of the events taking place – but extensive contestation or consultation over membership and terms of reference can impede effective investigation. In ways, this case illustrates the risks of over-deliberating the form and structure of an investigation. On the other hand, many of these complications could have been avoided had it been made clearer to conventional law enforcement (such as those interviewed during the RSF investigation, discussed above) how their work could interact with that of the Commission.

78 Interviews with the author, November 2016.

79 *Rapport de la Commission d'enquête indépendante* §1.7.

4.5 Transparency and participation

The Commission did not take steps actively to solicit testimony but, given the circumstances of the incident it was charged with investigating, this probably was not necessary. Material witnesses could easily be identified, and the Commission used a dedicated team of investigators to seek out such vital testimony.⁸⁰ Civil society participation in the process of the Commission was largely through the mechanism of direct membership, rather than participation as an *amicus* or coordinating the participation of others (as with some of the other case studies examined in this volume).

In its report the Commission highlighted the fact that witnesses had not come forward themselves as something that may have resulted in their recollection of events diminishing. They highlighted that, despite making available various means of communication including a hotline, fax, email, and a dedicated post office box – witnesses were not forthcoming. The Commission noted that in addition to the delays, discussed above, there was an obvious fear that had taken hold of a population that was already unwilling to testify in such circumstances. When they did come forward, the Commission noted, ‘memory had often suffered the test of time, removing from recollection the precision that one would have wished’.⁸¹

With respect to the availability of information more broadly, it is worth noting that while the state-controlled media reported on the dramatic events in the first few weeks after Zongo’s death, they were soon transformed into what a contemporary commentator derisively referred to as ‘bulletin boards’, content merely to reproduce the official communiqués of the various protagonists.⁸² An edition of the national television programme ‘Médiascopie’ that was to have been devoted to the case was not broadcast as scheduled on the Sunday after Zongo’s death; nor the following week. In an interview with the RSF investigators, a state television official said that a directive not to broadcast it had come from above.⁸³

This said, the Commission did not complain of any impediment to them accessing the media, nor were there any difficulties in publishing

80 Interviews with the author, November 2016.

81 *Rapport de la Commission d’enquête indépendante* §1.7 (‘à l’épreuve du temps, la mémoire s’est souvent étioyée, enlevant aux souvenirs la précision que l’on aurait souhaitée’).

82 Ouédraogo, “‘Affaire Zongo’: Les Burkinabè demandent justice’ (‘la plupart des journaux se cantonnent donc dans un rôle de «tableau d’affichage», se contentant de reproduire les communiqués officiels des différents protagonistes, fuyant les papiers d’analyse pour laisser la place à des interviews brutes’).

83 See RSF ‘Le Rapport de la mission (25-31 Décembre)’.

its report: the government indeed drew attention to the fact that, in keeping with the desire for transparency, it had published the report on the same day it received it.⁸⁴ This marked a departure from the previous commission of inquiry (about which MBDHP had warned) and perhaps reflects the advantage of the Commission having the authority to publish its own report.

4.6 Reconciliatory dimensions

Welcoming the installation of the Commission, an opinion piece in the prominent state daily *Sidwaya* entitled 'A Step Towards National Concord', it was highlighted that

we have the right to an accessible government, and to an open-mindedness on the part of those who, even yesterday, could only look daggers at each other. 'Those who will not sit together under the same tree will not find consensus' says one of our local maxims.⁸⁵

This op-ed made clear a narrative that was to become louder throughout the process: that the purpose of the Commission 'casting light' on the truth was to allow the population to move past Zongo's death. It was in everyone's interest, the paper noted, to arrive at a minimum consensus on the path to truth. With the creation of this Commission, the Burkinabè were demonstrating to the world that they 'know how to agree on the minimum to save the essential: peace, national concord'.⁸⁶

This notwithstanding, reconciliation was never an explicit objective of the Commission. As will be discussed below, following the natural progression of the emergence of this idea, reconciliation became an objective later of the *Collège de Sages* and initiatives such as the National

84 'Déclaration du gouvernement suite à la remise du rapport de la Commission d'enquête indépendante' (10 May 1999) printed in *Sidwaya* (12-13 May 1999) p.3. ('Conformément à la volonté de transparence du gouvernement, volonté qui l'a conduit à créer la Commission d'enquête Indépendante, première du genre en Afrique, il a le jour-même de la réception du rapport, procédé à sa publication.')

85 'VAS' 'Un pas vers la concorde nationale' *Sidwaya* (8-10 January 1999) p.3 ('on le doit à la disponibilité du gouvernement et à l'esprit d'ouverture de tous ceux qui, hier encore se regardaient en chiens de faïence. «Sauf ceux qui ne s'assoient pas sous le même arbre ne trouvent pas de consensus» dit une maxime de chez nous.')

86 *Ibid.* ('L'absence de dialogue conduit parfois à bien de déconvenues. L'avènement de cette commission vient en tout cas confirmer cette thèse et montre une fois au monde que les Burkinabè savent aussi s'entendre sur le minimum pour sauver l'essentiel : la paix, la concorde nationale ... Il allait donc de l'intérêt de tous de parvenir au consensus minimum sur le chemin de la vérité sans laquelle ceux qui sont partis ne daigneraient pas se plaindre dans le sommeil des justes.')

Day of Forgiveness. For the Commission, and for the debates around it, the focus was not so much on truth as a first part of a process of forgiveness but rather how a lack of truth or lack of even a 'minimum consensus' would never allow peace.

5 The impact of the Commission

5.1 Findings of the Commission

The Commission released its final report on 6 May 1999. It found that Zongo had been assassinated for purely political motives related to his investigative journalism. It placed on record a testament to the deceased as a defender of a democratic ideal who had made a commitment to fight for human rights and justice, and against impunity.⁸⁷ More specifically, it identified Zongo's investigation into the murder of David Ouédraogo as a significant factor leading to his being targeted. His companions, the Commission suggested, were killed only because they were with him at the time, so as to not leave any witnesses.⁸⁸

As to the perpetrators, the Commission held that it could not find enough formal proof and evidence conclusively to identify them. However, the Commission stated that there were inconsistencies and contradictions in the testimonies of the main suspects, especially with regard to their alibis. These suspects, two of whom were placed in custody during the work of the Commission, were all members of the RSP: Christophe Kombacere, Ousseini Yaro, Wampasba Nacoulma, Banagoulo Yaro, Edmond Koama and Marcel Kafando. The existence of these inconsistencies, the Commission noted, 'does not make them guilty, but serious suspects'.⁸⁹

In addition, the Commission made a series of recommendations to the government. Three related specifically to the case of Norbert Zongo, (i) that further legal action be taken, and that appropriate resource are given to the magistrate to undertake this; (ii) that the widows and orphans of all the victims benefit from the support of state services; and (iii) that, given

87 *Rapport de la Commission d'enquête indépendante* §4. ('Il défendait un idéal démocratique et avait pris l'engagement, avec son journal, de lutter pour le respect des droits de l'homme et la justice, et contre la mauvaise gestion de la chose publique et l'impunité.')

88 *Ibid.*, §3.1.

89 *Ibid.*, §4 ('Cela n'en fait pas des coupables mais de sérieux suspects.')

the barbarity of the crime, legislative measures be taken to ensure that no statute of limitations would apply to this case.⁹⁰

The Commission made three other recommendations, aimed at structural reforms of policing and justice, namely, (i) that all police texts and other materials should rigorously respect the distinction between military and policing functions, including in cases of state security; (ii) that the *Conseil de l'Entente*, which houses the presidential guard (and where David Ouédraogo and his companions had been tortured) should be subject to the rules of the army, and that the RSP should be limited in its mandate strictly to assuring the security of the head of state; and (iii) that all files on 'disappeared' or assassinated persons should be opened and definitively settled.⁹¹

5.2 Signing the report

One incident of high drama at the very end of the Commission's work was the decision by two of the three government members of the Commission not to sign the report. As several of the commissioners recall, at the time the Commission had been discussing the final report, there had been unanimity. Every commissioner, including the representatives of the state, had approved the text. The Chairperson then called for an hour's recess, during which various typographical corrections could be made to the manuscript before signature. However, two of the three government representatives never returned.⁹²

One of those who had not signed later came to try and explain, and to suggest that he could sign a revised version of the report in which there were no names and in which the attribution of responsibility was less direct. The Chairperson refused, knowing that there had been unanimity about the report as agreed, and which had now been signed by all but two members of the Commission. Meanwhile, the representative of the police, who had signed (as he had remained with the other members during the brief recess) now felt under extreme pressure and wanted to revoke his signature. The Chairperson reassured him, saying that if anybody tried to place him under pressure he should come to the other members of the Commission, and they would mobilise the public to defend him.⁹³

90 *Ibid.*, §5

91 *Ibid.*

92 Interview(s) with the author, November 2016. Also see 'Une mauvaise note pour les représentants de l'Etat' *Le Pays* (10 May 1999) p.3.

93 Interview(s) with the author, November 2016.

Having yielded to public pressure in December to enhance the civil society component of the Commission, it seemed that the government now wanted to diminish the credibility of the report by withdrawing its 'official' image. While there was clear evidence of the government's disquiet with the content of the report, there seems little indication that this event had any impact at all on the credibility of the report in the eyes of the public.⁹⁴ Indeed, the continued favour the Commission enjoyed with the 'man on the street' offered some protection of the independence of the commissioners (and their safety).⁹⁵

5.3 Reception of the report and the government's response

The report was published immediately upon receipt by the government, was reprinted in many of the national newspapers, and translated into local languages and printed again in local newspapers. One journalist pointed out that it was probably the most reported and publicised document in Burkina's history.⁹⁶ With the publication of the report, the protest movement 'began to get its second wind'.⁹⁷ Mobilised in part by this mass coverage, people again were out in large numbers on the streets. Certain prominent voices, such as those in the *Collectif*, were quick to draw out the salient details of the report and to highlight (and perhaps amplify) the extent to which the head of state was directly implicated.⁹⁸

As was quickly highlighted in newspaper commentary, it had not been the job of the Commission of Inquiry to deliver those responsible (both foot soldiers and commanders, *exécutants et commanditaires*) in handcuffs – their role had rather been to collect all the appropriate information and to facilitate the mobilisation of normal judicial mechanisms.⁹⁹ The expectation that this mobilisation should be taking place was volubly

94 See 'Une mauvaise note pour les représentants de l'Etat' *Le Pays* (10 May 1999) p.3.

95 Interview with the author, November 2016.

96 *Ibid.*

97 Hilgers, 'Identité collective et lutte pour la reconnaissance' p.178 ('Le mouvement de contestation connaît alors un second souffle.')

98 See for example 'Résultats de la Commission d'enquête: Le Collectif apprécie le rapport' *Le Pays* (11 May 1999) p.15.

99 Boureima Ouédraogo 'Conclusion de la CEI: Un crime politique' *Le Pays* (10 May 1999) p.3 ('Compte tenu de ses attributions et de ses prérogatives, la Commission n'avait pas pour objectifs de livrer à la justice et au peuple burkinabè les coupables (exécutants et commanditaires) menottes à la main, mais de rassembler toutes les informations à même de faciliter la mise en mouvement de l'action publique c'est-à-dire l'instruction judiciaire.')

expressed on the streets, the public clearly being unconvinced by stale CDP expressions of confidence in the existing mechanisms.¹⁰⁰

Meanwhile, a minor scandal was caused when the international representative on the Commission, Robert Menard, was quick to go on various public radio shows to discuss his views of the report and on the necessary next steps. He was eventually cut off half-way through one such broadcast and escorted back to his hotel, from where he was directed to leave the country immediately.¹⁰¹ However, the heavy-handed reaction on the part of the state did not quell the voices similar to that of Menard, in the *Collectif* and elsewhere. Indeed, his expulsion prompted criticism in its own right, including from the MBDHP.¹⁰²

The government clearly needed a more sophisticated response. As Harsch noted, its strategy was 'trying to defuse the popular anger, stall for time and deflect the contestation off the streets and into official channels and institutions, a more favourable terrain for the ruling elite'.¹⁰³ Broadly speaking, the government's response was in three parts: first, the pursuit of justice in the case of David Ouédraogo; second, the pursuit of reconciliation through the creation of another new, *ad hoc*, mechanism; and third, building on the recommendation of that second mechanism, the pursuit of forgiveness, through a National Day of Forgiveness.

Immediately after publishing the report, the government announced that it was handing the findings over to the courts for further judicial investigation and action, and several of the suspects named in the report were subsequently placed in custody.¹⁰⁴ As Bénéwendé Sankara, who acted as a lawyer for the Zongo family, later remarked in an interview, with people in the streets clamouring for truth and justice in the affair of Norbert Zongo, and with a Commission of Inquiry having established

100 For the response of the CDP to the Report, see 'Ce que pense le CDP du rapport' *Le Pays* (12 May 1999) p.4.

101 'Robert Menar[d] accompagné à la frontière' *Sidwaya* (10 May 1999) p.7; Abdoulaye Tao 'Robert Ménard expulse du Burkina' *Le Pays* (10 May 1999) p.2. It should be noted that during interviews more than one of Ménard's fellow commissioners contextualised this incident by pointing out that he had been a disruptive element throughout the process. He was described by one as an anarchist, who could not be trusted to meet government officials without starting to insult them.

102 'Déclaration du Mouvement burkinabè des droits d l'homme et de peuples (MBDHP)' *Le Pays* (12 May 1999) p.3.

103 Harsch 'Trop c'est trop!' p.402f.

104 'Déclaration du gouvernement suite à la remise du rapport de la Commission d'enquête indépendante' (10 May 1999) printed in *Sidwaya* (12-13 May 1999) p.3. See also Harsch 'Trop c'est trop!' p.402f.

that Zongo had been killed because of his investigation into the death of David Ouédraogo, it was important for the government quickly to put those suspected on trial.¹⁰⁵ So, five soldiers were brought to trial, and by August 2000 three had been convicted and sentenced: Marcel Kafando, Edmond Koama and Ousséni Yaro. While offering some hope that meaningful justice in the case of Norbert Zongo could be next, this case was very squarely focused on the *exécutants* rather than the *commanditaires*. RSF, responding publicly to the convictions, complained of ‘two-speed justice’, in which those in power who had been directly implicated – most obviously the President’s brother – were getting off scot-free.¹⁰⁶

Meanwhile, the government was also pursuing the other elements of its three-part response. Two weeks after the report was published, in his first major address to the nation since the beginning of the crisis, still facing continuing public pressure, President Compaoré announced the second element of the government’s response: another *ad hoc*, non-judicial, recommendatory body – this time called a *Collège de Sages* (a Council of Wisemen). This was a response, he said, to the straining of social cohesion, an effort to restore confidence in institutions and to strengthen faith in dialogue and consultation.¹⁰⁷

This amounted to another public acknowledgment of the lack of faith in the existing mechanisms of justice.

Since the *Collège* was composed of relatively conservative figures (religious leaders, traditional chiefs and three former presidents), many protest leaders viewed it as a diversion, a way for the government to avoid dealing directly with the *Collectif’s* pressure regarding the findings of the Commission. However, when the *Collège* issued its report, again very speedily, in early August, it included a more stinging critique of Burkina’s political system than many had expected. Meanwhile, the seniority and cultural status of its members ensured respect.

105 Interview of Bénéwendé Sankara in *Borry Banna: le destin fatal de Norbert Zongo* dir. Luc Damiba, Abdoulaye Diallo & Gidëon Vink (Semfilms, 2004).

106 RSF ‘Trois militaires de la garde présidentielle condamnés dans l’affaire David Ouédraogo’ (21 August 2000) available at: <https://rsf.org/fr/actualites/trois-militaires-de-la-garde-presidentielle-condamnes-dans-laffaire-david-ouedraogo> (‘Cette justice à deux vitesses va à l’encontre des propos du chef de l’État qui affirmait, en mai 1999, que le gouvernement prendra toutes les mesures afin que les personnes concernées, sans exception aucune, répondent aux sollicitations de la justice.’)

107 Blaise Compaoré ‘Message à la nation de son excellence Monsieur le président du Faso relatif à la situation nationale’ *Agence d’information burkinabé* (21 May 1999) (‘la cohésion sociale a été mise à rude épreuve et soucieux de préserver la paix sociale, de rétablir la confiance dans les institutions, de renforcer votre foi dans le dialogue et la concertation, le gouvernement prendra toutes les mesures’).

The *Collège*'s report dedicated a section to *les crimes de sang* (blood crimes), surveying a culture of political violence dating from 1982.¹⁰⁸ It noted a variety of different probable causes of this violence, ranging from political causes, such as the seizure of power by arms, the desire to retain power at all costs, a culture of violence as a form of government, a culture of impunity and an intolerance for plural thought, to more moral causes, such as a trivialisation of human life, abuse of power, and a spirit of revenge and rivalry. These, the *Collège* noted, were starkly antithetical to the national cultural values.¹⁰⁹

With respect to a proposed response, the *Collège* highlighted that the search for peace encompassed both the revelation of truth and the expression of justice. More specifically (and importantly given the character of the forgiveness that was subsequently sought) the *Collège* highlighted that it was important that culprits be identified and motives established. It contended that 'the admission or recognition of the facts and the request for pardon will facilitate the implementation of the remedies that are part of the human process for reconciliation'.¹¹⁰

The *Collège* also made a series of recommendations, firstly regarding recent crimes, which it described as the 'detonators of the current crisis'.¹¹¹ Among these it listed the killing of David Ouédraogo, Norbert Zongo and his companions, and Auguste Pépin Ouédraogo (an electricity board worker who had been beaten to death by police in January 1999 and whose death got wrapped up in the popular movement for justice). With respect to these cases, the *Collège* recommended that all possible light be shed on the cases; that all perpetrators, sponsors and accomplices be prosecuted according to the rule of law; and that justice be delivered within a reasonable time.¹¹² It further recommended (i) that the grave of David Ouédraogo be shown to his family; (ii) that an official apology be issued to all the families of the victims accompanied by a request for pardon; (iii) that widows and orphans of victims be paid by the state; and (iv) that

108 *Rapport du Collège de Sages sur les crimes impunis de 1960 à nos jours* (30 July 1999) §5.

109 *Ibid.*, §5.2. ('Ces raisons sont le fait d'une mauvaise assimilation d'idéologies totalement en désaccord avec les valeurs culturelles nationales.')

110 *Ibid.*, §5.3 ('concernant les crimes de sang, est-il nécessaire que les coupables soient identifiés et les mobiles établis. L'aveu ou la reconnaissance des faits et la demande de pardon faciliteront la mise en œuvre des réparations qui font partie de la démarche humaine pour la réconciliation. Il faudra de la volonté, du courage et de l'humilité tant du côté des victimes que du côté des coupables'). Taking this into account, the *Collège* also recommended that the death penalty not be imposed as a punishment.

111 *Ibid.*, §5.3.1 ('détonateurs de la crise actuelle').

112 *Ibid.*, §5.3.1.1.

moral and financial reparation be made to the tortured companions of David Ouédraogo.¹¹³

The *Collège* made a special, general, recommendation that a Truth and Justice Commission for National Reconciliation be established. This would have a two-part mission, first to help establish the truth about the various crimes that have taken place and ensure the right to reparation; and, second, to preside over a process of national reconciliation, aimed at achieving a ‘true catharsis’ and a firm desire for mutual forgiveness.¹¹⁴ For genuine reconciliation, the *Collège* advised against a general amnesty, but proposed that whatever structure be responsible for addressing these crimes should treat them in a manner aimed at reconciliation, including, notably, the possibility of a ‘guilty plea’, designed to allow truth to appear and automatically to reduce the penalties of all those who choose to proceed to sincere confessions.¹¹⁵ In an interview several years later Monseigneur Anselme Sanou (the Archbishop of Bobo-Dioulasso, who had chaired the *Collège*) recalled the example set by South Africa’s Truth and Reconciliation Commission, but the report itself made no reference to it.¹¹⁶

Again, the *Collège* was very clear about the necessity of acknowledging culpability at the same time as the seeking of pardon, noting that for catharsis actors needed to assume their responsibility and eventually recognise their wrongs in front of people determined to overcome a painful past, ‘so that the request for forgiveness and its granting come mutually’.¹¹⁷ In order to guarantee this desire for reconciliation the *Collège* recommended that this process begin with *le premier responsable du pays*, namely, the President. For this purpose, the *Collège* suggested, the President could make a short speech to the nation, solemnly declaring that

113 *Ibid.*, §5.3.1.2.

114 *Ibid.* §Special Recommendation (‘en vue d’une véritable catharsis et une ferme volonté de pardon mutuel’).

115 *Ibid.* (‘le Collège de sage recommande que la structure chargée des dossiers de crimes, les traite dans le sens d’une réconciliation prévoyant notamment la possibilité du “plaidoyer de culpabilité” (le “plaidoyer de culpabilité” consiste à prévoir les dispositions pour faciliter la manifestation de la vérité et pour réduire automatiquement les peines éventuelles de tous ceux qui choisiront de passer aux aveux sincères et de plaider coupable’)).

116 Interview with Anselme Sanou in *Borry Banna: le destin fatal de Norbert Zongo* dir. Luc Damiba, Abdoulaye Diallo, Gidëon Vink (Semfilms, 2004).

117 *Ibid.* (‘La catharsis suppose que les acteurs assument leurs responsabilités, reconnaissent éventuellement leurs torts devant un peuple déterminé à dépasser les écueils douloureux de son histoire afin que la demande de pardon et son octroi s’appellent mutuellement.’)

he assumes full responsibility for what had happened, that he apologises to the people, and promises that such practices will never happen again.¹¹⁸

Ultimately, the government did establish a National Reconciliation Commission (a change in name from the recommendation which seems quite significant).¹¹⁹ It was also able to point the public to its pursuit of criminal justice against the killers of David Ouédraogo. However, the government also created a third high-profile initiative, a National Day of Forgiveness, which was announced for 30 March 2000.

The *Collectif* and other opponents of the government rejected the idea of forgiveness before justice had been done, but its proponents advocated on the basis of cultural argument about uniting the people in the struggle for betterment and ‘civility’.¹²⁰ Former heads of state, notably Sangouk Lamizana, Jean-Baptiste Ouédraogo and Saye Zerbo, participated in the event alongside President Compaoré. However, instead of asking personal forgiveness, Compaoré asked for pardon in his capacity as head of state for all tortures and crimes committed against Burkinabé by other Burkinabé in the name of the state, stretching from 1960 until that day.¹²¹ It would appear that even this was a step further than many in government had wanted to go. According to one high-ranking member of the *Collège*, the fact that the President participated at all was only the consequence of a personal intervention by two extremely well-respected members of the *Collège* who had exhorted Compaoré to overrule the senior structures of the CDP and acknowledge the significance of the event.¹²²

5.4 The question of reconciliation

The principle objective of the Independent Commission of Inquiry was investigation – to shed light on what happened. As one interlocutor put it, whereas elsewhere some commissions have tried to achieve truth justice and reconciliation in one go, in the Zongo case there were multiple stages. The Independent Commission of Inquiry was only about truth and justice – then other commissions were put in place (the *Collège de Sages* and subsequently the National Reconciliation Commission).¹²³ While the National Day of Forgiveness was very broad in its scope, there was also a

118 *Ibid.*

119 Decree 99-390/PRES/PM. The Commission was installed on 23 November 1999 under the chairmanship of Dominique Sisso.

120 Hagberg, ‘Enough is Enough’ p.224f.

121 Compaoré’s speech was quoted in *L’Opinion* (4 April 2001).

122 Interview with the author, November 2016.

123 *Ibid.*

clear connection between it and *le drame de Sapouy* 15 months earlier. As the *Collège* had noted in their report, the crisis of recent months was structural, extending to all sectors of national life; the events of 13 December ‘were only the detonator’.¹²⁴

It was in the process of this latter, broader invocation of the value of pardon and forgiveness, rather than the highly-investigative character of the earlier Commission of Inquiry, that any reference to traditional values or practices was made. The *Collège de Sages*, in the conclusion of its report, suggested that the focus must move away from the conflicts of the past and toward the future (guided by its many recommendations). The society was driven, they contended, by both universal human values and ‘our own cultural values’ to accept a collective catharsis.¹²⁵

In its state report to the African Commission a few years later the government portrayed a very clear narrative of the National Day of Forgiveness, asserting that it

marked the beginning of an improvement in national politics. This shows that the people of Burkina Faso are capable of resolving crises through dialogue. It also illustrates the will of the authorities to guarantee civil and political rights at all cost.¹²⁶

As part of the proceedings before and after the National Day of Forgiveness, families of those who had suffered, including the family of Norbert Zongo, were approached about accepting a token sum of reparations. The Zongo family, and several other families of prominent victims of the regime, refused this money, asserting that first it was necessary for those who were culpable to admit what they had done.

124 *Rapport du Collège de Sages* §Introduction (‘La crise actuelle que notre pays traverse depuis quelques mois est réelle et profonde. Elle n’est pas que conjoncturelle ; elle est structurelle. Elle s’étend à tous les secteurs de la vie nationale et touche toutes les couches de la population. Elle se manifeste dans les domaines social et culturel, politique et administratif, économique et enfin au niveau éthique. Les tragiques événements récents, notamment le drame intervenu le 13 décembre 1998 à Sapouy, n’en ont été que le détonateur.’)

125 *Ibid.* §Conclusion (‘Ensemble et dans le respect, non seulement des *valeurs humaines universelles* mais aussi de *nos valeurs culturelles propres*, le devoir nous impose de puiser chacun, dans la profondeur de ses ressources, les éléments nécessaires à l’acceptation d’une catharsis collective. Une telle démarche sera entreprise dans l’esprit d’un cheminement vers la réconciliation des cœurs en vue de reconstruire la paix sociale, condition indispensable au développement durable dans un monde en pleine mutation.’)

126 *Periodic Report of Burkina Faso to the ACHPR* p.10 (English version).

In an interview for the documentary film *Borry Banna*, made a few years afterwards, Zongo's mother related how the village chief was sent to see her, and how the authorities had told him to ask her for forgiveness. She recalled her outrage at the notion that her son could be killed – and burned – and that then the authorities would ask for forgiveness. As for the offer of money that came with the request for public pardon, she ridiculed the idea that you could kill someone and then pay his parents for forgiveness.¹²⁷

5.5 The issue of prosecutions

In its same state report the government noted that, alongside the Commission of Inquiry, a judicial investigation into the Zongo affair had also been undertaken by the High Court of Ouagadougou. The conclusions of the Commission of Inquiry were included in the findings of that investigation, which also identified the same individual as one of the likely suspects: Marcel Kafando. In February 2002, the state report noted, he was charged by the examining magistrate with murder and deliberate arson.¹²⁸

Kafando had by this time already been convicted for the death of David Ouédraogo. However, in 2006 his prosecution for the Zongo murder was dismissed on the grounds that a key prosecution witness, Jean Racine Yaméogo, had retracted testimony. Kafando died in 2009 after a long illness.¹²⁹

With the dismissal of the case, national proceedings of accountability in the Zongo case were formally ended, and the opportunity thus arose for representative of the families of the victims, including his widow, Genevieve, assisted by MBDHP, to pursue justice at the African Court on Human and Peoples' Rights. This is not the place for an extended discussion of the case, but in March 2014 the Court found that the

127 Interview with Norbert Zongo's mother in *Borry Banna: le destin fatal de Norbert Zongo* dir. Luc Damiba, Abdoulaye Diallo, Gidëon Vink (Semfilms, 2004) ('Il me dit qu'il a une charge lourde ... Les autorités lui ont dit de me demander pardon ... J'ai répondu que je suis d'un certain âge, mais je n'ai jamais vu pareil horreur ... On tue un être humain et on le brûlé ... Ils auraient pu au moins laisser le corps ... Je le dis et je le répète : je ne peux pas accepter ce pardon ... J'irai à la tombe sans accepter le pardon ... Et l'argent qu'on me propose, c'est quoi ça! On ne peut pas tuer quelqu'un et vouloir que ses parents acceptent de l'argent pour pardonner! Je ne peux accepter le pardon. Non! Non!')

128 *Ibid.*, p.8 (English version).

129 'Décès de Marcel Kafando, seul inculpé dans l'affaire Zongo' *Jeune Afrique* (25 December 2009) available at: <http://www.jeuneafrique.com/156973/politique/d-c-s-de-marcel-kafando-seul-inculp-dans-l-affaire-zongo/>.

government of Burkina Faso had breached the African Charter when it failed effectively to investigate Zongo's death, finding a violation of article 7 of the Charter.¹³⁰ That ruling was not understood by the *ancien régime* as requiring them to re-open the case, so the parties prepared to ask the Court to clarify that a proper investigation at the national level would be a central part of the proposed remedy.¹³¹

As it happened, investigations in the Zongo case were reopened in March 2015 (four months after President Compaoré's departure), in fact slightly pre-empting the African Court's ruling on remedies (in June 2015) which made it clear that it *had* intended that reopening the investigation be considered part of the reparation. Three new arrests were made in December 2015, all of former members of the RSP, all named by the original Commission of Inquiry.

The landmark event in the case only happened another 15 months later, when in May 2017 the *juge d'instruction* issued a warrant for the arrest of François Compaoré, which became public knowledge in July. Initially the warrant was ignored (most pertinently by the French, since Compaoré was travelling with impunity between his life in exile in Côte d'Ivoire and his other relatives in France). However, at the end of October that suddenly changed, with French authorities announcing that they had taken him into custody at Roissy-Charles-de-Gaulle airport in Paris.¹³² What sparked the change in policy is hard to discern. One Burkinabé government official mentioned that it may have been related to a large public demonstration a fortnight before which had formed outside the French embassy demanding justice in the matter of Thomas Sankara (not a directly related issue but close enough perhaps to inspire government action); alternatively, the official speculated that it may have been related to a visit to Burkina of the French President, Emmanuel Macron, planned for later in the year.¹³³

130 African Court on Human and Peoples' Rights *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernst Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v Burkina Faso* (Application 13/2011) Judgment (28 March 2014). It should be noted that the Court did not find a violation of the right to life (art. 4), which it considered lay outside its temporal jurisdiction.

131 Interview with the author, November 2016.

132 Morgane Le Cam 'Burkina Faso: François Compaoré interpellé à Roissy dans l'affaire Norbert Zongo' *Le Monde* (29 October 2017) available at: http://www.lemonde.fr/afrique/article/2017/10/29/burkina-le-frere-de-l-ancien-president-compaore-retenu-a-l-aeroport-roissy-charles-de-gaulle-dans-l-affaire-norbert-zongo_5207537_3212.html.

133 Interview with the author, November 2017. Also see 'Burkina: des manifestants réclament «justice» pour Sankara, 30 ans après sa mort' *AfricaNews* (15 October 2017) available at: <http://fr.africanews.com/2017/10/15/burkina-des-manifestants>.

The role of the Commission in this continued campaign for accountability is clearly complex. On the one hand, although basing many of their arguments upon its report, the applicants alleged (and the Court agreed) that the Commission did not amount to an effective investigation.¹³⁴ On the other hand, lawyers in Burkina Faso today acknowledge that the Commission's report was of vital importance, in that it would not, for example, have been possible for the transitional government to re-open the cases against the three remaining members of the RSP without it.¹³⁵ During the early stages, as one lawyer observed in 2016, this reopened investigation arguably was vulnerable to the same critique as the Commission's report, that it lacked findings of those ultimately responsible – here meaning the *commanditaires*.¹³⁶ However, with the arrest warrant issued for Francois Compaoré in May 2017, the *juge d'instruction* has also taken on the less specific finding of the Commission, and drawn a direct link between the former President's brother and the instigation of the attack on Zongo. Of course, the *juge* presumably is also drawing upon evidence recovered over the last several years, including a reportedly large number of documents found in Francois's abandoned residence in Ouagadougou.¹³⁷ Nonetheless, one representative of the new government was still at pains to stress the extent to which the lineage of the current investigation must be traced back to the existence of an official, *international* independent commission of inquiry conducted at the time.¹³⁸

6 Evaluation

As was pointed out by a member of the new government, the Commission may have done exceptional work, but its findings – and its recommendations – were insufficiently utilised by those who were responsible at the time.

reclament-justice-pour-sankara-30-ans-apres-sa-mort/.

134 Moreover, the Court suggested that the government's failure to follow up on the various alternate explanations of events, explored and closed off by the Commission of Inquiry, was part of the government's wider failure to pursue justice in terms of art. 7.

135 Interview with the author, November 2016.

136 *Ibid.*

137 Interview with the author, November 2017. On the documents discovered at Francois Compaoré's residence, see Joris Fiorti & Armel Baily 'Burkina Faso: foire aux documents volés chez François Compaoré' *Agence France-Presse* (7 November 2014) available at: <http://www.lapresse.ca/international/afrique/201411/07/01-4816858-burkina-faso-foire-aux-documents-voles-chez-francois-compaore.php>; Wendpouiré Balboné 'Affaire Norbert Zongo: les documents retrouvés chez François Compaoré ont-ils parlé?' *Les échos du Faso* (14 December 2015) available at: <http://lesechosdufaso.net/affaire-norbert-zongo-les-documents-retrouves-chez-francois-compaore-ont-ils-parle/>.

138 Interview with the author, November 2017.

Indeed, he contended, had they been fully implemented, the subsequent political crisis the country faced in 2014 may never have occurred.¹³⁹ However, at the end of its work the Commission transmitted its findings to a judge, and had to rely on that existing judicial structure – the very judicial structure the corruption of which it had been created to avoid – to make actionable its report. Meanwhile, the government was able to point to its administrative status, and highlight that it had not itself been able to demonstrate conclusive proof of culpability against anyone.¹⁴⁰

Far from contributing to the expected relaxation of the social climate, the results of the Commission of Inquiry triggered further unrest.¹⁴¹ However, the government's response was a very passive one of establishing another commission – the *Collège* – this time much more conservatively constituted. When even that body surprised the government by making a series of hard-hitting recommendations, the government seized on one idea, the question of 'pardon', and exaggerated it out of all proportion to the other recommendations (including the one about the limitation of presidential terms as a check against abuse and corruption). Nonetheless, the process was an illustrative example of how important public mobilisation can be in catalysing accountability, and how it can play a continuing role sustaining momentum throughout.

Moreover, some see a direct link between the Zongo affair and the more recent political change, especially when linked by the report of the *Collège de Sages*. Some involved with the Commission highlighted that, had the recommendations of the Commission been implemented, the political crisis of 2014 might never have transpired. Others highlighted that the *Collège* made a number of direct recommendations related to the election process – and the limitation of presidential terms – which ultimately was the issue of contention in 2014.¹⁴²

Impact on the culture of impunity in Burkina Faso

As Hagberg has noted, *le drame de Sapouy* was not interpreted as a single and isolated assassination, but as part of a corrupt political culture. It became the starting point for a widely-mobilised socio-political struggle against

139 Interview with the author, November 2016.

140 'Déclaration du gouvernement suite à la remise du rapport de la Commission d'enquête indépendante' (10 May 1999) printed in *Sidwaya* (12-13 May 1999) p.3.

141 An analysis shared by the *Collège* itself; see *Rapport du Collège de Sages* §Introduction ('loin de participer à la décrispation escomptée du climat social, les résultats de l'enquête déclencheront davantage de troubles').

142 Interviews with the author, November 2016.

impunity, in which the issue of the right to life was uppermost.¹⁴³ As Zongo himself had written after the death of Clément Oumarou Ouédraogo, the first and ultimate sign, the only evident sign of the existence of the rule of law, is respect for human life.¹⁴⁴ He ended that article with his famous expression, now partly immortalised on the Monument aux Martyrs: *De grâce! Plus jamais ça!*

Writing in 2002, Hagberg was eager to point to the impact that the response to the Zongo affair had had on this culture of impunity. He noted that while other people have been killed since 1998, there was no longer an assurance of political protection. He highlighted the case of Auguste Pépin Ouédraogo (the civil servant working for the national power company), in which case the gendarmes implicated were convicted and imprisoned. Similarly, when in June 2000 a traditional Mossi king in Tenkadogo killed a man belonging to the town's political opposition, there was a national debate about the role of traditional chieftaincies in national politics.¹⁴⁵

In terms of a check on unaccountable government it is worth noting the impact of the Zongo affair on the status and self-perception of the press and wider media in Burkina Faso. As a well-placed observer of the media pointed out, while certain government-controlled media outlets tried to play a disruptive role during the crisis, the vast majority of journalists were galvanised by what they saw going on around them and grew into a role the public sought, of providing necessary information on political abuses of power.¹⁴⁶ Zongo's own paper *L'Indépendant* grew in stature and began to take on further investigative journalists and projects.

The government's decision, very shortly following Zongo's death, to accede to three key international human rights instruments was not directly linked to the work of the Commission (but was linked with the Constitution, and with international opinion, both of which were sources of challenge to the government, as a consequence of the Zongo affair).¹⁴⁷ As a current representative of the government noted, it was likely that the government was merely trying to burnish its credentials, but those

143 Hagberg 'Enough is Enough' p.232.

144 Zongo wrote the article in *Journal du Jeudi* (12-18 December 1991), discussed in Hagberg 'Enough is Enough' p.232.

145 Hagberg 'Enough is Enough' p.232. Also see *Journal du Jeudi* (6-12 July 2000) p.9.

146 Interview with the author, November 2016.

147 The government of Burkina Faso acceded to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment on 4 January 1999.

accessions, and the reporting procedures they implied in the years that followed, did in some small way contribute to international human rights language and processes entering the vocabulary of Burkinabé politics.¹⁴⁸ That the events of 1998-1999 were a watershed for the formal protection of human rights (and an acceptance of the new vocabulary) is further evidenced by the establishment of a State Secretariat for the Promotion of Human Rights in November 2000, the establishment of a National Human Rights Commission in November 2001 and the formalisation of a Government Ministry for the Promotion of Human Rights in June 2002.¹⁴⁹

The creation of a Commission of Inquiry created a focal point for activism regarding the particular event of Zongo's death and more broadly the culture of impunity. The fact that the Commission was designed to include so many representatives of civil society made it a forum in which their work was reinforced and galvanised. Many of those interviewed working in the civil society space (both at the time and since) saw civil society's participation in the proceedings as a significant indicator of the Commission's success.¹⁵⁰

Likewise, although only the first part of a long (and at present incomplete) process of accountability, the Commission of Inquiry played an important role in influencing public consciousness of questions around impunity in Burkina. The population subsequently welcomed the report of the *Collège* with its authority and balance, and seemed not to have been distracted by the government's one-sided approach to the question of reconciliation. As one of the litigants in the African Court case recalled, throughout that process the case remained very much in the public mind.¹⁵¹

6.1 The Zongo Commission as part of an accountability process

As noted at the outset, a widespread lack of confidence in existing mechanisms can be a reason why a commission of inquiry is established. There is a certain paradox to this rationale: a commission of inquiry can make findings and can (as in this case, although it proved unnecessary) be empowered to make those findings public; however, it will invariably rely upon another actor (usually executive or judicial) to implement its recommendations – the very actors whose reluctance to act or whose

148 Interview with the author, November 2016.

149 Interview with the author, November 2017.

150 Interviews with the author, November 2016.

151 *Ibid.*

corruption is so widely acknowledged that it was thought necessary to establish a Commission of Inquiry in the first place. As was noted by one of the commissioners, this perhaps was particularly true of an administrative rather than a judicial commission of inquiry: they had to transmit the results of their inquiry to a judge for action. Finding the right judge who would be sufficiently empowered, but at the same time sufficiently independent to take on the results of the Commission of Inquiry, was quite a challenge.¹⁵²

In terms of how its role was perceived by the commissioners themselves (and indeed by some contemporary observers) a distinction was drawn between the Commission and a mechanism of accountability (*reddition de compte*). The Commission's function was not itself to hold people to account, but rather to establish who should be brought before justice, and to establish the facts for which those responsible should be brought to justice.¹⁵³ In this regard, according to one observer, it did good work, but it was followed by many distractions (such as the *Collège*). The normal practice, he intimated, would be to establish the truth (the Commission's work), pursue justice, and afterwards work for reconciliation. In this case the Commission established the facts, but the government attempted to move immediately to reconciliation without establishing who was responsible and pursuing justice.¹⁵⁴

Up to a point, the pursuit of accountability for the death of Norbert Zongo is a paradigmatic case of the way in which justice can be mechanistically avoided through *ad hoc* semblances of governmental response. The government used a commission as an attempt, in the words of one observer, to 'calm the fever' of the population that were on the streets, but the fever kept returning. At every stage of the process the government made proclamations concerning the pursuit of justice, while deferring action to another new mechanism with an ever-broader mandate aimed at reconciliation. None of those mechanisms were able to address the festering charge of impunity, and ultimately it took a wholesale change of government for meaningful action to be taken.

However, on the other hand, sitting at the beginning of this long process, the Commission of Inquiry benefits from the comparison – it was a narrowly-mandated, independent and investigative mechanism that produced a very clear account of the evidence available to it, and drew appropriate conclusions within a reasonable period of time. It provided

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

a focal point for civil society, both locally and internationally, to draw attention to the problem of impunity, while its report was a very public interruption in what had hitherto been a constant official silence regarding such crimes. The extent to which non-governmental organisations found that they could mobilise around a human rights issue, actively and successfully contest the government on how it went about fulfilling its duty to investigate, and ultimately participate in the process was a landmark for many. More importantly, the Commission established a clear, official record of what had happened and identified clear avenues for future criminal inquiries. Although it took a long time for all of those avenues to be followed up, and although it remains to be seen how much information from the original investigation will be useable in the forthcoming criminal cases, the Commission's report was at least a valuable starting point. It is not surprising that, in retrospect, people working around accountability and human rights in Burkina Faso have a favourable impression of the role the Commission played.